No. 12761

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, co-owners of the Oil Screw MARSHA ANN,

Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, GEORGE KORGAN, W. H. HOOPES, NICK MILOSEVICH, and SAM BILAS,

Appellees.

APPELLANTS' REPLY BRIEF.

TRIPP & CALLAWAY,
HULEN C. CALLAWAY,
935 Van Nuys Building,
Los Angeles 14, California,
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellees.

APPELLANTS' REPLY BRIEF.

The Appellees Have Failed to Show That the Trial Court Did Not Err in the Various Particulars Assigned by Appellants.

Appellees have attempted to justify and protect the decision of the trial court and have been unable so to do. A step by step analysis of the contentions of the appellees as set down in their brief clearly shows that there can be no justification or explanation for the errors committed by the trial court. For example:

1. On pages 5 to 7 of their brief appellees contend that the starboard hand rule applies only to vessels which are in sight of each other and can continually check each

other's position. Appellees further contend that this rule would directly conflict with Article 16 of the International Rules for the Prevention of Collisions at Sea because it provides that a vessel "hearing, apparently forward of her beam, the fog *signal of a vessel the position of which is not ascertained* shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

In fact, a close analysis of Articles 16 and 19 show that they are complementary and do not conflict in the slightest. Article 16 purports to cover only those cases where the fog signals heard by any given vessel are coming from another "vessel the position of which is not ascertained." Once the position of the vessel sounding the signals is ascertained there is no necessity for Article 16 to apply and Article 19 then applies. To contend otherwise would be to leave two vessels meeting on the high seas in a fog without guidance from the International Rules except for the admonition that they each "navigate with caution." But how are the vessels to govern themselves once each has ascertained the position of the other? As already pointed out on page 32 of appellants' opening brief unless there is a uniform rule governing the actions of such vessels neither vessel could safely move on its course again without danger. Manifestly, therefore, the starboard hand rule must be applied even in fog, at least where it is shown that the vessels had sighted each other. Here, the BEAR, the burdened vessel had sighted the privileged vessel, the MARSHA ANN, 10 seconds before the collision and had ample opportunity to keep clear of the MARSHA ANN since the testimony of its own crew was to the effect that the engines of the BEAR could take hold in reverse in less than half the time which elapsed between the time

that the MARSHA ANN was sighted and the time of the collision.

In brief, we agree with appellees when they say "the import of Article 16 is well known to the courts, admiralty proctors and mariners." (Appellees' Br. p. 7.) Appellants merely wish to go on to say that it is also well known to the courts, admiralty proctors and mariners that all complementary rules of the road should be heeded when applicable. As already shown above, to avoid an impasse two vessels finding themselves in a situation similar to the one at hand must resort to Article 19 to safely proceed on their respective courses.

2. On page 7 of their reply brief appellees insist that the MARSHA ANN did not make proper use of her radar, even though they admit on page 8 of their brief that the radar operator attended his duties diligently. The appellees support their contention in this regard with the dramatic and inaccurate statement to the effect that "the MARSHA ANN literally shut her eyes and stood into the jaws of a collision." (Appellees' Br. p. 8.)

It is uncontradicted that the radar set of the MARSHA ANN was "blind" within the minimum 200 yard radar range. Once the BEAR had come within this "blind" spot, the MARSHA ANN was absolutely and completely as devoid of radar "eyesight" as would be any vessel not equipped with radar. Are not appellees in effect trying to say "The MARSHA ANN had radar, therefore it was liable for the collision even though its radar was absolutely ineffective within a range of 600 feet"? Clearly, this is a ridiculous contention on its face when it is realized that a vessel such as the BEAR, only 68 feet in length could change its course scores of times from the instant it

vanished off the radar screen of the MARSHA ANN, 600 feet away, and the time it came into actual collision with the MARSHA ANN. And certainly the erratic whistle blowing of the BEAR would not have a tendency to indicate its course to any surrounding vessels.

A study of the "radar cases" cited by the appellees on the aforesaid pages 8 to 10 of their brief shows that these cases are not in point and are not in any manner determinative in the instant case for the following reasons: In the *Barry-Medford,* 65 Fed. Supp. 622, the offending vessel had absolutely failed to even use her radar. In the case of the *Australia Star-Hindoo,* 74 Fed. Supp. 145, we find that the offending vessel had utterly failed to make any determined or systematic readings. In brief, a summary of these two cases indicates that the offending vessel had not in either case used her radar properly. Now let us look at the instant case, where we find that the MARSHA ANN had made proper use of her radar by frequent and constant readings and in fact had "sight" of the BEAR at all times until she came within the 200 yard "blind spot" of the MARSHA ANN's radar. How could the MARSHA ANN more properly use her radar?

3. On page 11 of their brief appellees maintain that appellants "lifted two sentences from Judge Carter's remarks at the end of the trial as a basis for building an argument that the MARSHA ANN was dead in the water when the collision occurred." Appellees go on to quote from Judge Carter's remarks as follows:

> "I think that the motors of the MARSHA ANN were not turning at the time of the collision. However, I think the MARSHA ANN at the time of the collision

was sliding through the water fast enough to constitute negligence on the part of the MARSHA ANN, together with all the other circumstances of the case."

Though appellees lean heavily upon Judge Carter's statement above quoted, to the effect that the MARSHA ANN "was sliding through the water fast enough to constitute negligence," they utterly fail to quote the reasoning of Judge Carter which lead him to such a decision. His reasoning was as follows:

"First of all you have got a situation where the MARSHA ANN had come up the coast without any fog, gone into the harbor and discharged her fish. She had then started to proceed out of the harbor, and the first fog was encountered before she got to the light within the harbor.

"On the other hand, the BEAR had hit fog earlier, had hit fog off of Seal Beach, probably, and had been fighting its way through the fog for some time before the collision.

"*I have driven an automobile in fog, and so have you, and I know it is a matter of common experience when you hit fog, and the fog begins to get heavier, your first tendency is to bowl on through it, and the farther you get into the fog the more difficult it becomes to drive, and you wind up creeping in the fog. There is nothing in the record, probably, on that particular point, but my conclusion is that the* MARSHA ANN, having hit the fog for the first time inside the harbor, the fog began to thicken up, probably by the time she got to the light it began to get heavier, the MARSHA ANN's tendency was to cut her speed as she proceeded but she had for the first time come in contact with fog." [A. 573, 574.] (Italics added.)

Appellants will make no effort whatsoever to discuss the merit of the rationale of the court since the fallacy is self evident, but appellants will agree with the trial court when it states that there is nothing in the record to show that the MARSHA ANN was proceeding at an excessive speed at the time of the collision. Furthermore, if the MARSHA ANN "a vessel some six times heavier than the BEAR" struck the BEAR at the speed claimed by appellees the BEAR would have been practically severed in two parts. However, as the photographs introduced in evidence clearly show, the steel band encircling the BEAR was not even broken through.

4. On page 12 of their brief appellees speak of the "pivoting point" of the BEAR. They reason that normally the pivot point is slightly forward of amidships and if the vessel is down by the stern the pivot point moves aft. They further go on to say that since the BEAR was returning with a load of fish, she "would" be down by the stern hence her pivot point would be aft and there would not be any swing amidships where the MARSHA ANN purportedly hit the BEAR. This whole discussion on the part of appellees is clearly gratuitous and has no place even in an argument for the reason that there was absolutely no evidence whatsoever introduced by appellees at the time of trial to show where the pivot point of the BEAR was, either loaded or unloaded. Therefore, there is no evidence in the record of any kind relative to the maneuverability of the BEAR to offset the claim of appellants that the BEAR could, and in fact did, pivot into the stem of the MARSHA ANN. Furthermore, reference to the photographs in evidence showing the bow of the MARSHA ANN indicates a bending of the stem of the MARSHA ANN to the starboard

which is consistent with the claims of the appellants. If the blow was struck in the manner contended by appellees, the stem of the MARSHA ANN would have been bent straight in. Briefly the physical make-up of the wound in the BEAR and the damage to the stem of the MARSHA ANN indicate quite clearly that the BEAR had swung into the bow of the MARSHA ANN.

5. Appellees insist on page 13 of their brief that the erratic and inconsistent fog signals of the BEAR did not contribute to the collision. In fact, on page 16 of their brief they even try to show that the signals of the BEAR were proper. An examination of the cases and authorities cited by appellees shows that the particular vessel therein referred to was "sounding proper signals, while navigating in Long Island sound." (Appellees' Br. p. 16.) Certainly, it will be admitted by appellants that if proper signals were being given, their frequency might not jeopardize surrounding vessels. However, where, as here, the offending vessel was indiscriminately sounding fog signals without any regard to their meaning, it can only be said that the frequency of such signals would tend to confuse, rather than aid, surrounding vessels. Appellants will not further extend their discussion of this point but refer the court to the argument found on pages 17 to 22 of their opening brief.

6. On page 17 of their brief appellees state:

> "Appellants also state: 'The District Court erred when it found: Sixth: (1) That at the time of the said collision the BEAR was proceeding at a speed of about one to one and one-half miles per hour.' (Br. 23.) We believe that appellants' paraphrasing of the court's finding is not accurate."

To correct appellees' error appellants will quote verbatim the finding of the court which was not paraphrased by appellants. The finding is set out on page 62 of the apostles as follows:

> "The Court finds that the facts pertinent to said collision are as follows: *The* BEAR *was proceeding at a speed of about 1½ miles per hour* in a general northwesterly direction toward and about 2 miles southeast of the Los Angeles Harbor Breakwater Light." (Italics added.)

7. On page 17 of their brief appellees maintain that the argument of appellants relative to the excessive speed of the BEAR was based upon computations which in turn were based on the time and point of departure of the BEAR earlier on the morning of the collision from the fishing grounds off Oceanside, California. Appellees go on to say "None of these factors are accurately known." This is, indeed, an amazing statement when it is realized that all of the evidence relating to the time and point of departure of the BEAR was taken from testimony of the crew of the BEAR. [A. pp. 102, 192.]

To further support their position that the BEAR was not speeding at the time of the collision, the appellees refer to the testimony of their crew to the effect that immediately prior to the collision the BEAR was "alternately stopping and then proceeding with caution at a speed of approximately 1½ knots." (Appellees' Br. p. 18.) But how does such a contention have any merit in the face of the testimony of the Captain of the BEAR who testified that the BEAR would negotiate 2½ miles to the jetty in 20 minutes [A. p. 241, Appellants' Op. Br. p. 25.] To travel such a distance in 20 minutes the BEAR clearly was moving at a speed of approximately 7½ miles per hour. As already

brought out on page 24 of the opening brief of appellants, Captain Milosevich, upon examination by his own proctor, testified that in the dense fog prevailing at the time in question the BEAR expected to negotiate a certain distance in 35 or 40 minutes. [A. p. 241.] That distance was approximately 7 or 8 miles according to the same witnesses' testimony [A. p. 206] and the speed at which the said Captain expected to proceed was 8½ miles per hour. [A. p. 207.]

Surely, this testimony of the Captain of the BEAR by itself is sufficient to prove that the trial court erred when it found that the BEAR was not proceeding at an excessive speed immediately prior to, and at the time of, the collision.

8. On pages 18 to 20 of their brief appellees attempt to show that they had five men on the open bridge and one man standing on deck on the starboard side who were looking and saw the MARSHA ANN. The facts, of course, are otherwise. Only Captain Milosevich, Mr. Ancich (the cook) and Mr. Miskulian were in the pilot house of the BEAR. [A. pp. 146, 214.] Mr. Bogdanovich was standing "under the green light" [A. p. 286] and testified that "part of it was my own will to go up there on a lookout." [A. p. 285.] Mr. Hoopes, the engineer of the BEAR, was also standing "under the green sidelights." [A. p. 136.] He was not acting as a lookout but was merely "looking out the same as anybody else would." [A. p. 136.]

It is clear from the testimony of these crew members of the BEAR that nobody was designated as a lookout of the BEAR. On page 20 of their brief appellees contend that these persons who were topside on the BEAR were efficient because of the fact they purportedly "picked up the MARSHA ANN at 50 to 60 feet, the maximum visibility." The

credibility of Captain Milosevich and two other members of the crew of the BEAR to wit: Mr. Ancich and Mr. Bogdanovich is, however, seriously questioned by their own testimony to the effect that they saw the bow of the MARSHA ANN at 50-60 feet (the maximum visibility) and at one and the same time, saw the pilot house of the MARSHA ANN [A. pp. 232, 283, 298] which is considerably aft of the bow of the MARSHA ANN. In short, appellees want us to believe that these three witnesses could see well beyond the maximum visibility range to which they testified.

9. Appellees totally fail to justify the excessive damages awarded for the injuries to the BEAR. They rely completely on the fact that the MARSHA ANN "a vessel some six times heavier than the BEAR" (Appellees' Br. p. 22) struck the BEAR "a crushing broadside blow." (Appellees' Br. p. 22.) From this they reason that the damages were not excessive. However, as already shown above, if the MARSHA ANN had been proceeding at the speed claimed by appellees and struck the blow claimed by appellees the BEAR would have been literally torn in half.

Appellants will readily agree with its surveyors that damages resulting from a collision may be, to some extent, a matter of opinion. However, it is seriously questioned whether two surveyors could disagree as to the amount of damages by about $10,000.00 to $12,000.00. When one reflects upon the experience and background of the respective surveyors, he is lead unerringly to the conclusion that the disparity between the estimates made by the respective surveyors clearly is not one attributable to the

variance of expert opinion but rather to the fact that such damage was not caused by the collision.

10. In support of their contention that the fishermen appellees had a cause of action for the loss of anticipated profits the appellees rely almost completely upon the decision handed down by Judge Carter and indeed they quote at length from the said decision. (Appellees' Br. pp. 28 to 30.) An analysis of Judge Carters decision and the contentions of the appellees shows that they have erred in various particulars in an attempt to judicially legislate into existence a cause of action for the fishermen.

On page 30 appellees quote Judge Carter as follows: "They (the fishermen) have no right of recovery against their Master or the owner of a boat unless he be at fault . . . to refuse them the right to sue in their own names, places them at the whim and caprice of their employer and may involve conflicting interests." On the other hand, appellees on page 31 of their brief quote from *U. S. v. Laflin*, 24 F. 2d 683, wherein it is said that the fishermen "might sue him (the owner) for damages if he neglected to prosecute the same (an action on behalf of the crew)."

On June 12, 1950, Judge McCarthy of the United States District Court for the District of Massachusetts rendered an opinion in a case which is exactly "on all fours" with the case at hand. The case was *Hayes, et al. v. Luckenbach S. S. Co., et al.*, 92 Fed. Supp. 684. There the libelants were the captain and members of the crew of the trawler LUCKY STAR. The libel alleged that the LUCKY STAR was lying made fast at a usual and proper berth at the Boston

Fish Pier; that the LYNCHBURG VICTORY while being towed by the ARES and SATURN struck the LUCKY STAR on her starboard side and crushed her against the Fish Pier causing serious damage to the LUCKY STAR.

All respondents filed exceptions to the libel on the ground that the facts averred in the libel were insufficient and did not constitute a cause of action against the respondents within the Admiralty and Maritime jurisdiction of the court.

The court discussed the various cases cited by the appellees in their brief herein together with the decision of *Van Camp Sea Food Co. v. DiLeva, supra,* and sustained the exceptions to the libel and dismissed same.

It is admitted by appellees (Appellees' Br. p. 3) that the trial court asked for "cases or a *theory* under which the seamen or fishermen could recover." [A. p. 577.] (Italics added.) The appellees were unable to find any case to sustain recovery for the fishermen. The decision of the trial court rests upon "a theory" to the effect that the fishermen are "the real parties in interest in such an action as this, and as such should be the parties to bring the libel." [A. p. 59.] But how can the fishermen be the real parties in interest to a cause of action which they do not have? The Supreme Court of the United States stated this same thought as follows:

> *"The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have* been bound to pay over a part by reason of his personal relations with the respondents." (Italics added.) *Robbins Dry Dock & Repair Co. v. Flint,* 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927) at page 309.

Conclusion.

It is apparent from the foregoing that the appellees have failed to show that the court did not err in the various particulars assigned by the appellants in their opening brief. On the other hand, appellants have demonstrated herein and in their opening brief that the trial court erred grievously.

It is respectfully submitted that the judgment of the trial court be reversed.

Respectfully submitted,

TRIPP & CALLAWAY,
HULEN C. CALLAWAY,
Attorneys for Appellants.